

STATE OF MICHIGAN
COURT OF APPEALS

ELITE PUBLISHING, LLC,

Plaintiff-Appellant,

v

W. EDWARD WENDOVER and SALLY
REPECK,

Defendants-Appellees.

UNPUBLISHED

January 31, 2003

No. 235001

Wayne Circuit Court

LC No. 00-039214-CK

Before: White, P.J., and Kelly and R. S. Gribbs*, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition to defendants based on res judicata. We reverse and remand.

Defendants and Thomas Prose, plaintiff's principal, have a lengthy history of litigation. In the instant action, plaintiff, the assignee of all assets, including causes of action, owned by the Plymouth Canton Community Crier, Inc. (the Crier), alleged that during defendant Wendover's presidency of the Crier, he and his wife – defendant Repeck – entered into questionable transactions constituting breach of fiduciary duty, unjust enrichment, breach of contract, and conversion. The circuit court held that the action was barred under the doctrine of res judicata because the instant case presents the same claims as those presented in *Bane v Chorkey*, unpublished opinion per curiam of the Court of Appeals, issued January 25, 2002 (Docket No. 224378).

We review de novo a trial court's grant of summary disposition. *Pinckney Community Schools v Continental Casualty Co*, 213 Mich App 521, 525; 540 NW2d 748 (1995). Under MCR 2.116(C)(7), "[t]he contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant." *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). A party may support a motion under MCR 2.116(C)(7) with affidavits, depositions and other documentary evidence. *Alcona Co v Wolverine Environmental Production, Inc*, 233 Mich App 238, 246; 590 NW2d 586 (1998). If such material is submitted it must be considered. *Id.* The applicability of collateral estoppel and res judicata are questions of law that this Court reviews de novo. *Phinisee v Rogers*, 229 Mich App 547, 551; 582 NW2d 852 (1998), (res

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

judicata); *McMichael v McMichael*, 217 Mich App 723, 727; 552 NW2d 688 (1996) (collateral estoppel).

Prose, along with Larry Bane and John E. Thomas, filed a shareholder derivative suit against the Crier's board, including defendants Wendover and Repeck. *Bane, supra*, slip op at 2. On appeal from a grant of summary disposition to the Board, a panel of this Court affirmed and held that Prose, Bane, and Thomas were not shareholders at the time the suit was filed and thus lacked standing to maintain the suit. *Id.*

After the dismissal of the earlier lawsuit for lack of standing, Prose purchased the Crier's assets and causes of action through the sale of its bankruptcy estate. Prose transferred the assets to plaintiff. Plaintiff then initiated the instant action.

On appeal, plaintiff contends that neither res judicata nor collateral estoppel preclude plaintiff's complaint. We agree.

For res judicata to apply, three prerequisites must be met: "a prior decision on the merits; the issues must have been resolved in the first case, either because they were actually litigated or because they might have been presented in the first action; and both actions must be between the same parties or their privies." *Sloan v Madison Heights*, 425 Mich 288, 295; 389 NW2d 418 (1986) (citations omitted). The party asserting the doctrine bears the burden of proving the applicability of res judicata. *Id.*

Here, although the underlying claims presented in *Bane, supra*, were essentially identical with those asserted in the instant action, *Bane* was not decided on the merits of those claims, but rather, on the standing issue, and the parties involved are not substantially similar. Plaintiff is not Prose's privy in relation to the prior action. "A privy is one who, after rendition of the judgment, has acquired an interest in the subject matter affected by the judgment through or under one of the parties, as by inheritance, succession, or purchase." *Howell v Vito's Trucking and Excavating Co*, 386 Mich 37, 43; 191 NW2d 313 (1971) (citations omitted).

Here, Prose acquired the assets of the Crier in Bankruptcy Court after his shares had been redeemed and after *Bane* was dismissed. Plaintiff is Prose's privy in relation to claims based on the Crier's claims, but not in relation to the claims dismissed in *Bane*. Further the instant claims, derived from the corporation itself, could not have been brought by the *Bane* plaintiffs because the assets were not purchased until after that action was dismissed. Although plaintiff is bringing the same claims against two of the same defendants as the *Bane* plaintiffs brought against the Crier's board -- including the current defendants -- unlike Prose, Bane, and Thomas, plaintiff in the instant action has an interest in the claims. Thus, the issues and parties in the two actions are different, and the instant action is not barred by res judicata.

"Collateral estoppel bars the relitigation of issues previously decided in a first action when the parties to the second action are the same; where the second action is a different cause of action, the bar is conclusive regarding issues actually litigated in the first action." *Stolaruk Corp v State of Michigan*, 114 Mich App 357, 361-362; 319 NW2d 581 (1982), citing *Braxton v Litchalk*, 55 Mich App 708, 718; 223 NW2d 316 (1974).

Collateral estoppel applies when “the same ultimate issues underlying the first action [are] involved in the second action.” *Stolaruk Corp, supra* at 362. Also, the parties must have had an opportunity to fully litigate the ultimate issues in the first action. *Id.* Finally, collateral estoppel only applies if the litigants in the second action are bound by the first action’s final judgment. *Id.* As with the doctrine of res judicata, plaintiff was not bound by the final judgment in *Bane, supra*, because the liability issues were not decided in the first action, only the standing issues. Purportedly, the plaintiffs in the first action were suing on behalf of the Crier, but as this Court held, they had no interest in the Crier. *Bane, supra*, slip op at 2-3. Here, plaintiff is the Crier’s assignee, and therefore has an interest in this cause of action.

Thus, neither res judicata nor collateral estoppel bar plaintiff’s claims, and the circuit court erred in granting summary disposition to defendants.

On appeal, plaintiff also questions whether the circuit court would have erred by granting defendants summary disposition based on plaintiff’s lack of capacity to maintain the action, the existence of another identical pending action, or the statutes of limitation or repose, issues raised by defendants below. Because the circuit court granted summary disposition only on res judicata and did not address these alternate arguments, these arguments are not appropriately considered on appeal, and we do not address them. Defendants may renew these arguments on remand.

Reversed and remanded. We do not retain jurisdiction.

/s/ Helene N. White
/s/ Kirsten Frank Kelly
/s/ Roman S. Gribbs